

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JOSEPH PRIKOPA II,

Defendant-Appellant.

UNPUBLISHED

July 22, 2014

No. 313539

Macomb Circuit Court

LC No. 2011-003034-FC

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of five counts of possession of child sexually abusive material, MCL 750.145c(4), and one count of using a computer to commit a felony, MCL 752.796, MCL 752.797(3)(d). Through an amended judgment of sentence, the trial court imposed concurrent prison terms of 17 months to 4 years for each possession of child sexually abusive material conviction, and 18 months to 7 years for the conviction of using a computer to commit a crime, with credit for 337 days served.¹ Defendant appeals as of right. We affirm defendant's convictions, but vacate defendant's sentences for possession of child sexually abusive material, and remand for resentencing.

¹ The trial court originally sentenced defendant to concurrent terms of 18 months to 7 years in prison for each possession of child sexually abusive material conviction, and a concurrent term of 18 to 48 months for the conviction of using a computer to commit a crime. Defendant moved the trial court for resentencing on the grounds that his sentences for possession of child sexually abusive material exceeded the recommended sentencing guidelines range. The trial court granted the motion. At a July 2013 hearing on defendant's motion for resentencing, the trial court agreed that it would arrange for the scoring of sentencing guidelines on the five possession of child sexually abusive material convictions, which previously had not been scored. An updated presentence information report (PSIR) reflects a guidelines range of between 2 and 17 months for each possession of child sexually abusive material count. On resentencing, the trial court imposed a term of imprisonment of 17 months to four years for each possession of child sexually abusive material conviction. See Section VII, *infra*.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and his girlfriend, Nicole Bellanca, began living together approximately three years before defendant's trial. Bellanca and defendant used the same computer, which defendant brought with him when he moved into the shared residence. They had separate Windows login accounts, and Bellanca denied knowing defendant's password or ever using his account. The relationship ended, and Bellanca planned to move out of the apartment in early 2011.

On April 23, 2011, she logged onto the computer to look for photographs of hers that she intended to delete; she had difficulty locating any photos and called her stepfather, who helped guide her through a search for ".jpg" photo files. Bellanca testified that "that's when [she] found a couple of pictures," one of which depicted "a nine to eleven year old, spread-eagled tied up on the bed," and called 911. Bellanca denied knowing about or ever having previously seen any child pornographic images on the computer. Bellanca stated that defendant possessed "a very extensive knowledge" about computers and could build his own. Police seized the computer.

Clinton Township Police Detective Jeffrey Barbera analyzed the computer. The trial court certified Barbera as an expert in computer forensic analysis. The initial search uncovered 80 or 90 images depicting child sexually abusive material in two different areas of defendant's computer. A more extensive search revealed that a new operating system had been installed on the computer in January of 2011. The account for defendant's user name was created on January 12, 2011. Barbera testified that on January 17, 2011, someone downloaded approximately 2,800 "files and folders . . . from an outside source" like "a hard disk or a hard drive or a thumb drive" into a folder named "Omega Red" in the computer's program files. Barbera related that during his interview of defendant, he had referenced the content of the "Omega Red" folder as his. Bellanca's account was not created until January 25, 2011. The file transfer contained legal materials, adult pornography, and almost 1,000 images of child sexually abusive activity; the latter images were located in three subfolders separated from the other files. Nine scanned Polaroid pictures of nude photographs of a sixteen year old girl were found in the folder containing adult pornography. The subject of the photograph testified that she and defendant had started dating when she was 14 or 15 years of age and defendant was 18 years of age, and that she agreed to pose for several nude photographs that defendant took when she was 16.

Barbera's investigation further revealed the March 16, 2011 installation of a file-sharing program called "eMule," which allowed a user to download files anonymously from files offered for download by other eMule users. According to Barbera, defendant's user name "was logged in to . . . install" eMule and to download files using eMule. Barbera recalled that he located 79 images containing child sexually abusive material in an incoming [or download] folder for eMule. Barbera located in three different "Omega Red" subfolders ["New Folder 2," "Origin" and "5555"] child sexually abusive images "similar to what [he] found . . . in the incoming folder" of eMule; Barbera explained that the file names he found in the eMule incoming folder ("Lolita," "preteen" and "young") also appeared on some images in the "Omega Red" subfolders, although the labels did not necessarily correspond with the same images from the eMule incoming folder because many images in the "Omega Red" subfolders had been renamed. Further, 58 images of child sexually abusive material "had been transferred from . . . the incoming [or download] folder" in eMule to an "Omega Red" folder on defendant's computer

and into a subfolder; these files had names including “pre-teen[,] Lolita [and] young.” 219 additional child sexually abusive images were downloaded and transferred to subfolders on March 26 and 28 of 2011.

In his interview with Barbera, defendant did not admit downloading any child pornography. Defendant suggested that Bellanca might have placed the images on the computer out of spite, or alternatively that he might have unwittingly obtained the child pornographic images when he downloaded adult pornography. Barbera viewed as implausible that Bellanca might have framed defendant because both Bellanca and defendant had told him that she did not “have that much computer knowledge.” Barbera also viewed as unlikely defendant’s second explanation because many of the child pornographic images had labels like “Lolita,” “preteen” and “underage,” “many of the images had been renamed,” and defendant had acknowledged “that he was very meticulous with his files.” Barbera conceded that he did not know what person had sat at the keyboard when the unlawful file downloads and transfers occurred.

Adam Kelly, “a digital forensics examiner with” “a licensed private detective agency,” was certified by the trial court as an expert in “the preservation, extraction, analysis and presentation of digital media and general computer and operating system operations.” Kelly performed a forensic examination of defendant’s hard drive. Kelly testified that Bellanca’s account could download files, contrary to her testimony. Kelly explained that a password for a user’s profile in Windows 7 would shield from others’ view only that user’s My Documents folder; a password would not prevent another user from accessing other areas of the computer, and he saw nothing else that would have prevented another user of the computer from accessing all of its other areas. Therefore, Kelly successfully viewed the images on the computer “without entering any passwords.” Kelly also agreed that absent a surveillance system, a forensic examiner could not identify what person may have performed particular acts on a computer.

The jury convicted defendant as described above. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant initially challenges the sufficiency of the evidence supporting his convictions of possession of child sexually abusive material. Defendant argues that because the evidence showed that he lived with a woman and shared his computer with her, the evidence was insufficient to establish that he possessed any unlawful material recovered from the computer. This Court reviews de novo a criminal defendant’s challenge to the sufficiency of the evidence supporting his conviction. *People v Harverson*, 291 Mich App 171, 175-177; 804 NW2d 757 (2010); *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). “[W]hether alleged conduct falls within the scope of criminal law is a question of law subject to review de novo.” *People v Cassadime*, 258 Mich App 395, 398; 671 NW2d 559 (2003). In determining whether sufficient evidence exists “to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation and citation omitted).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [Nowack, 462 Mich at 400 (internal quotation and citation omitted).]

“It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

At the time defendant allegedly possessed child sexually abusive material in 2011, MCL 750.145c(4) provided:

A person who knowingly possesses any child sexually abusive material is guilty of a felony . . . , if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Our Supreme Court has observed that “the term ‘possesses’ [in MCL 750.145c(4)] has a unique legal meaning.” *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010). In *Flick*, *id.* at 13-14, the Supreme Court examined as follows the meaning of “knowingly possesses” in MCL 750.145c(4):

The Legislature reasonably selected the verb “possesses” to communicate that only a person who has the power to exercise a degree of dominion or control over “any child sexually abusive material” is sufficiently culpable to fall within the scope of MCL 750.145c(4). That is, the possessor holds the power or authority to control or exercise dominion over child sexually abusive material at a given time. . . . [T]he Legislature also modified the verb “possesses” with the adverb “knowingly,” thereby requiring a specific *mens rea* or knowledge element as a prerequisite for establishing criminal culpability under MCL 750.145c(4). Stated another way, unless one knowingly has actual physical control or knowingly has the power and the intention at a given time to exercise dominion or control over a depiction of child sexually abusive material, including an “electronic visual image” or “computer image,” either directly or through another person or persons, one cannot be classified as a “possessor” of such material.

Moreover, this interpretation of the term “possesses” is consistent with the established meaning of possession in Michigan caselaw. In our criminal jurisprudence, possession is either actual or constructive. Possession can be established with circumstantial or direct evidence, and the ultimate question of possession is a factual inquiry to be answered by the jury. Proof of actual physical possession is not necessary for a defendant to be found guilty of possessing contraband, including a controlled substance. Although not in actual

possession, a person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Dominion or control over the object need not be exclusive. This Court has described constructive possession of an article in the context of firearms as when there is proximity to the article together with indicia of control. Similarly, when analyzing whether the defendant had constructive possession of cocaine, the Court stated “[t]he essential question is whether the defendant had dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). [Some quotation marks and citations omitted.]

The circumstantial evidence introduced at trial was sufficient to support the jury’s rational determination beyond a reasonable doubt that defendant knowingly possessed the child sexually abusive material. No evidence suggested that anyone other than defendant and Bellanca, his former girlfriend, had access to defendant’s computer. Bellanca denied downloading the child sexually abusive images, or ever having used defendant’s login identification for the computer they shared. Barbera, a forensic computer expert, testified that while logged into the computer with defendant’s identification, someone (1) transferred thousands of files onto the computer, many of which constituted child sexually abusive material, and (2) downloaded a file-sharing program known as eMule and used the program to download many more images depicting child sexual abuse. Barbera also testified that defendant had extensive knowledge about computers, whereas both defendant and Bellanca agreed that Bellanca did not know much about computers. This evidence supports defendant’s identification as the person who transferred and downloaded the child sexually abusive images. To the extent that the jury credited Bellanca’s denial that she had downloaded the child sexually abusive images, we may not revisit the jury’s credibility determination. *Nowack*, 462 Mich at 400. Furthermore, the evidence concerning the many child sexually abusive images imported and downloaded to defendant’s computer at different times gave rise to a reasonable inference that defendant knowingly had actual physical control over the child sexually abusive images on his computer. *Flick*, 487 Mich at 13. Thus, defendant’s convictions are supported by sufficient evidence.

III. EXPERT TESTIMONY

Defendant next argues that the trial court erred in permitting Barbera to twice offer opinions that exceeded the scope of his experience. Defendant also argues that the opinions were inadmissible lay opinions because they did not rest on Barbera’s perception of events. Because defendant did not object to the challenged testimony at trial, this issue is unpreserved. We review unpreserved issues to detect whether any plain error affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant contests the admissibility of Barbera’s trial testimony under MRE 702, which states:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

After Barbera recited the scope of his training in the identification and collection of evidence from computers, the trial court certified him as an expert in computer forensic analysis. Barbera spoke with Bellanca before undertaking his forensic analysis of defendant's computer. Barbera then detailed the scope of his investigation, which included the discovery of hundreds of child sexually abusive images on defendant's computer and his interview of defendant. In response to the prosecutor's questions about two means by which defendant suggested the unlawful images might have appeared on his computer, Barbera discounted the explanations. With respect to defendant's theory that Bellanca put the images on the computer, Barbera viewed this explanation as dubious in light of her statement about her limited computer knowledge, defendant's agreement that she did not possess much computer knowledge and her denial that she had access to the password for defendant's login identification. Regarding defendant's theory that he might have inadvertently downloaded some of the child pornographic images when he downloaded adult pornography, Barbera did not view this explanation as persuasive in light of the fact that (1) Barbera believed that because many of the child sexually abusive images bore descriptive titles (like "Lolita," "underage," and "preteen"), defendant likely would have seen and deleted them if he had wanted only adult pornography; (2) many of the child sexually abusive images had been renamed and placed in different folders on the computer; and (3) defendant admitted "that he was very meticulous with his files."

We reject defendant's characterization of this testimony as "impermissible since it exceeded the degree of [Barbera's] expertise, which was limited to the collection of data from a computer." Defendant never challenged Barbera's qualification as a forensic computer expert. Barbera's testimony about the large quantity of child sexually abusive images on defendant's computer formed the basis for his opinions regarding the unlikelihood of defendant's suggestions that Bellanca had tried to frame him or he might have unwittingly received child sexually abusive materials while downloading adult pornography. Furthermore, Barbera's specialized knowledge aided the jury's comprehension of the nature of many of the files on defendant's computer, Barbera's testimony in this regard rested on "sufficient facts or data," the testimony was "the product of reliable principles and methods," and Barbera "applied the principles and methods reliably to the facts of the case." MRE 702.

Defendant also suggests that portions of Barbera's testimony exceeded the degree of his expertise and were thus lay opinion testimony, and further that this testimony violated MRE 701 to the extent that it did not rest on his own "perception of the events that took place," but instead "was based on information provided by [defendant] and others." As stated above, we find that Barbera's testimony was properly admitted under MRE 702. Further, such testimony would be properly admitted as lay opinion testimony under MRE 701.

Pursuant to MRE 701, a witness may offer "testimony in the form of opinions or inferences" that "are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Barbera's testimony made clear that in addition to the forensic examination of defendant's computer, his

investigation included discussions with Bellanca and an interview of defendant. Barbera's opinion testimony concerning the likelihood of defendant's defenses took into account the entirety of his investigation, the forensic examination, his conversation with Bellanca, and an interview with defendant, and thus satisfied MRE 701(a). Barbera's opinion testimony also assisted the jury in deciding what weight to give defendant's explanations for the appearance of child sexually abusive materials on his computer. MRE 701(b). We conclude that any portions of Barbera's opinion testimony that represented his lay, rather than expert, opinion were admissible under MRE 701. *Chastain v Gen Motors Corp*, 254 Mich App 576, 589; 657 NW2d 804 (2002) (reiterating that police officers may offer lay opinion testimony "derived from the[ir] . . . [own] observations" in a particular case); *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod in part on other grounds 433 Mich 862 (1989).

Finally, defendant argues that Barbera impermissibly offered an opinion regarding defendant's guilt by stating his opinion regarding the plausibility of defendant's explanations for the presence of child sexually abusive material on his computer. An expert witness is not allowed to make a conclusion of law regarding a defendant's guilt or innocence. *People v Drossart*, 99 Mich App 66, 79; 297 NWd2d 863 (1980). However, the record clearly reflects that Barbera did not offer an opinion on whether defendant committed the offense of possession of child sexually abusive material or use of a computer to commit a felony; rather Barbera merely opined that the alternative explanations provided by defendant during his interview were implausible. Expert witness testimony is permitted to "embrace" ultimate issues to be decided by the jury. MRE 704. Barbera's opinion that two explanations for the presence of child sexually abusive material on defendant's computer were implausible is not equivalent to an opinion on defendant's guilt or innocence—the jury was still required to find beyond a reasonable doubt that defendant knowingly possessed the materials at issue. *Flick*, 487 Mich at 13. We thus find no plain error in the admission of Barbera's testimony.

IV. OTHER ACTS EVIDENCE

Defendant next argues that the prosecutor violated MRE 404(b) by asking Bellanca irrelevant and unfairly prejudicial questions that elicited testimony concerning defendant's threats of violence toward her and his statements about holding pagan beliefs. Because defendant did not object to the inquiries or the elicited testimony at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764, 774.

MRE 404(b) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. MRE 404(b)(1); *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Evidence of a defendant's other acts or crimes is admissible if: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), (2) the other acts evidence is relevant under MRE 401, and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh the probative value of the evidence under MRE 403. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

The prosecutor's direct examination of Bellanca concluded with her statement that her only contact with defendant after calling the police occurred in the form of "a bunch of text

messages,” in which defendant threatened her and her stepfather. During defense counsel’s cross-examination of the witness, counsel questioned her about the text messages in a manner confirming that they “had to do with [defendant] wanting to know what happened to his computer,” “threatening to tell Walgreen’s about” her probationary status for a shoplifting charge, and feeling “angry about the computer being gone.” In an effort to support a defense theory that Bellanca was biased against defendant, defense counsel also questioned her about several April 2011 allegations she made against defendant in seeking a personal protection order (PPO). On redirect examination, the prosecutor and defendant’s former girlfriend engaged in the following relevant exchange:

Q. . . . [A]nd after receiving those text messages, what did you do?

A. I filed a PPO and I turned the phone in to the detective.

* * *

Q. Okay. One of those text messages that was [sic] apparently received by you on April 24[, 2011] at 4:39 a.m.; is that correct?

A. Yes.

Q. There’s a reference in there that’s highlighted that he still owns you?

A. Yes.

Q. What does that mean that [defendant] owns you?

A. He believed he owned my soul.

Q. Okay. How did he come about that?

A. He . . . believes that he’s a pagan, a fallen horseman. I’m not sure where he got it from.

Q. Fallen horseman refers to one of the Four Horsemen of the Apocalypse?

A. Yes.

Q. And he believes he’s the fallen horseman?

A. He believes—yes.

Q. And as part of that, he owns you?

A. Yes.

* * *

Q. Why did you feel the need to file a request for a personal protection order?

A. He threatened my life. He said he still owns me. He threatened to do something to my stepfather and my job.

The challenged inquiries and the responses they elicited did not violate MRE 404(b). Defendant's primary defense at trial involved attacking the credibility of Bellanca, which occurred throughout defense counsel's cross-examination of the witness. The cross-examination raised questions about the witness's general credibility and motives for reporting defendant to the police and testifying at trial, including her anger at defendant for having cheated on her. The challenged testimony was not introduced to show defendant's propensity to commit criminal acts, but was intended to rehabilitate Bellanca's credibility by specifying the basis for her fear of defendant after reporting him to the police. MRE 404(b); MRE 401; see also *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001) (evidence related to alleged bias of witness is always relevant). The relatively brief questioning by prosecutor about the genesis of defendant's belief in owning the witness's soul did not inject unfair prejudice that substantially outweighed the probative value of the questioning. MRE 403; see also *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified in part on other grounds 450 Mich 1212 (1995) (describing the concept of unfair prejudice as embodying the notions of "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury," and that "it would be inequitable to allow the proponent of the evidence to use it"). The challenged testimony was thus admissible.

In related argument, defendant also argues that the prosecutor committed misconduct by eliciting Bellanca's testimony, and that his trial counsel was ineffective for failing to object to the admission of Bellanca and Barbera's testimony. This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Because the prosecutor properly questioned the witness on redirect and the elicited testimony was admissible, there was no misconduct.

With respect to defendant's contentions that defense counsel was ineffective for failing to object to Bellanca's testimony (as well as to the prosecutor's elicitation of Barbera's opinion testimony, as discussed in Section III), we have found that the challenged testimony was properly admitted; defense counsel therefore was not ineffective for failing to object. Counsel need not raise meritless objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

V. SCORING OF OFFENSE VARIABLE 13

Defendant additionally challenges the trial court's scoring of 25 points for offense variable (OV) 13, which relates to a pattern of criminal behavior. He argues that the trial court

misinterpreted the language comprising OV 13, which authorizes a 25-point score only if the sentencing crime, in this case using a computer to commit a crime, constitutes part of a pattern of felonies involving three or more crimes against a person. Defendant theorizes that because a conviction of using a computer to commit a crime does not qualify as a crime against a person, the court improperly scored OV 13.

We review for clear error a trial court's factual determinations with respect to the scoring of offense variables in the sentencing guidelines, and such determinations "must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We consider de novo the legal question of statutory interpretation inherent in "whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Id.* When construing the meaning of the statutory language comprising the sentencing guidelines, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "The first step in that determination is to review the language of the statute itself." *Id.* (internal quotation and citation omitted). If the statutory language is plain and unambiguous, "we presume that the Legislature intended the meaning clearly expressed," *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999), and "no further construction is necessary or allowed to expand what the Legislature clearly intended to cover." *Pasha*, 466 Mich at 382.

In MCL 777.43, the Legislature authorized the scoring of OV 13, in relevant part as follows:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.

* * *

(c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. 25 points

* * *

(g) No pattern of felonious criminal activity existed. 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. [Emphasis added.]

The cases cited by defendant support the proposition that when scoring OV 13, a court must consider only the type of felonies identified in the relevant subsection of MCL 777.43(1), in this case "crimes against a person," MCL 777.43(1)(c). However, defendant offers no authority in support of his contention that a court may score 25 points under MCL 777.43(1)(c) only if the crime scored for sentencing purposes also falls within the category of crimes against a person. Defendant's argument to this effect would render nugatory the language in the statute

providing that “[f]or determining the appropriate points under this variable, *all crimes* within a 5-year period, including the sentencing offense, shall be counted” MCL 777.43(2)(a) (emphasis added). Defendant’s five concurrent felony convictions of possessing child sexually abusive material all qualify as crimes against a person, MCL 777.16g, and support a scoring of 25 points under MCL 777.43(1)(c).

Furthermore, under the circumstances of this case, the sentencing offense, use of a computer to commit a crime, MCL 752.796, amounts to a crime against a person. The offense category for a violation of MCL 752.796 is determined “based on the underlying offense.” MCL 752.797(3)(d); MCL 717.17c(2). Here, the offenses that defendant committed with his computer, namely possession of child sexually abusive material, constitute crimes against a person. See MCL 777.16g(1). Therefore, the offense of using a computer to commit a crime, in the instant case, also constitutes a crime against a person.

VI. FAILURE TO ADMIT GUILT

Defendant next argues that the trial court improperly relied on his failure to admit guilt, while ignoring his potential for rehabilitation, when it resentenced him. A trial court in sentencing a defendant may not be influenced by a defendant’s refusal to admit guilt. See *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). However, a trial court may address a defendant’s lack of remorse as it relates to the potential for rehabilitation. *Id.* at 714.

At resentencing, defendant urged the trial court to impose “a community sanction” that would make available “a plethora of programs . . . immediately,” and the following discussion ensued:

The Court: Okay. *Had there been a Defendant’s description of the offense and what the Defendant wanted to say and he was truly sorry and maybe remorseful and maybe suggesting that, yes, I screwed up, I really need some therapy. There is nothing here that indicates that.* All the Defendant says, the Defendant was asked to describe how this offense occurred and he wrote, the Defendant pled not guilty. *So there’s no impetus on his part to want to get rehabilitated, despite the jury finding.*

Miss Peters [a representative from the probation department], do you want to elaborate on that?

Ms. Peters: I can speak to the therapeutic setting. He will fail immediately. He has maintained his innocence all along through this entire process. Sending him into the therapeutic program his Counsel indicates, we’ll be right back here in two weeks because they will not entertain his . . . version of the offense and his version of the behavior that led to his conviction. He’s not amenable to community treatment because he does not admit he’s done anything wrong.

The Court: That’s the stumbling block.

Ms. Peters: They can't treat him for something he says never happened, Your Honor. [Emphases added.]

Our review of the record does not support defendant's contentions. The record instead confirms that the trial court found no likelihood of rehabilitation on defendant's part, a proper consideration for the court. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (observing that a defendant's lack of remorse and his minimal potential for rehabilitation constitute "legitimate considerations in determining a sentence"); *Wesley*, 428 Mich at 714. The resentencing record also supports the trial court's findings regarding the unlikelihood of defendant's rehabilitation, specifically the facts that defendant failed to describe the offenses in a revised presentence information report, and a probation agent deemed unlikely any therapeutic success for defendant.

VII. FAILURE TO IMPOSE INTERMEDIATE SANCTIONS

Defendant lastly asserts that the trial court erred in failing to explain any substantial and compelling reason for sentencing him to prison for the possession of child sexually abusive material convictions, as dictated by MCL 769.34(4)(a). We consider de novo this legal question of statutory interpretation. *Hardy*, 494 Mich at 438.

The parties agree that the minimum guidelines range for these convictions was 2 to 17 months. Pursuant to MCL 769.34(4)(a):

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

In *People v Lucey*, 287 Mich App 267, 268-269; 787 NW2d 133 (2010), the guidelines recommended a minimum term of imprisonment for the defendant between 5 and 17 months, and the trial court sentenced him to a term of imprisonment between 17 and 30 months. This Court observed that the trial court had neglected to state on the record a substantial and compelling reason for imposing a term of imprisonment instead of an intermediate sanction, and the record did not make "clear . . . that the trial court realized its sentence was a guidelines departure." *Id.* at 273-274. This Court remanded for either the imposition of an intermediate sanction or an explanation on the record of "a substantial and compelling reason to sentence defendant to the jurisdiction of the Department of Corrections." *Id.* at 274.

The trial court's comments when sentencing defendant to a minimum term of 17 months in prison for the counts of possession of child sexually abusive material similarly do not contain an explanation of a substantial and compelling reason for sentencing defendant to prison instead of an intermediate sanction.² As in *Lucey*, 287 Mich App at 274, it likewise appears unclear whether the trial court understood that a prison sentence constituted a departure from the guidelines range.³ Consequently, we vacate defendant's sentences for possession of child sexually abusive material and remand for resentencing to an intermediate sanction or articulation of a substantial and compelling reason for departure consistent with *Lucey*.

Affirmed in part, vacated in part, and remanded for resentencing or articulation. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

² The minimum guidelines range for the offense of using a computer to commit a felony was 5 to 23 months and so did not require the imposition of an intermediate sanction absent a substantial and compelling reason for a prison sentence.

³ Although the trial court did state that it tailored the sentence to both the offense and the offender, that it had gathered complete and detailed information about defendant, and that it had considered "the disciplining or punishment of the wrongdoer, the protection of society, the potential for rehabilitation of the Defendant, [and] the deterring of others from committing like offenses[.]" the record does not reflect that the trial court stated a specific substantial and compelling reason to sentence defendant to prison rather than intermediate sanction; nor did the trial court indicate at any point that it was departing from the guidelines. Nothing in this opinion should be taken as a statement by this Court that such a substantial and compelling reason for departure does or does not exist, only that the trial court is required to articulate such a reason on the record.